SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 486

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT AS TO JURISDICTION

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Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith its statement particularly disclosing the basis upon which that Court has jurisdiction on appeal to review the judgment of the Supreme Court of Michigan entered in this cause.

Opinions Below

The opinion of the Supreme Court of Michigan is reported at 328 Michigan Reports 650 (adv. sheets). A copy of its opinion (and the dissenting opinion) is attached

hereto as Appendix A. The opinion of the Circuit Court for Ingham County and the opinion and order of the Michigan Public Service Commission are also attached hereto (Appendix B and C, respectively).

Jurisdiction

The judgment of the Supreme Court of Michigan was entered on October 27, 1950. A petition for appeal is presented to the Supreme Court of Michigan herewith on December 1, 1950.

The jurisdiction of the Supreme Court of the United States to review this judgment on appeal is conferred by 28 U. S. C. Sec. 1257 (2).

This is a bill in equity to prevent the enforcement against the plaintiff of a Michigan statute, and an order thereunder, that forbid selling natural gas in a municipality already being served without first obtaining a certificate of public convenience and necessity. Act 69, Sec. 2, Public Acts of 1929. It is set up that the statute and order as construed to apply to interstate commerce are contrary to the commerce clause of the Constitution of the United States and are therefore void.

Plaintiff, Panhandle Eastern Pipe Line Company, owns and operates an interstate natural gas transmission pipeline, transporting natural gas from gas wells in Texas, Oklahoma and Kansas into Michigan.

In October 1945, Panhandle Eastern made a contract to sell direct from its main transmission line 25,000 m.c.f. of natural gas a day to the Ford Motor Company at its Dearborn, Michigan, plant for its own consumption. The Ford plant to be served was within a municipality already served by Michigan Consolidated Gas Company, a public utility engaged in distributing gas to the public.

The Michigan Public Service Commission, on complaint of Michigan Consolidated and after hearing, issued an order under Act 69 (February 18, 1946) that Panhandle Eastern—

> "* * * cease and desist from making direct sales and deliveries of natural gas to industries within the State of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this Commission to perform such services."

The Commission conceded that—

> "* * * the State of Michigan, under the commerce clause of the federal constitution, is deprived of the power to impose as a condition upon the right to act in interstate commerce the requirement of obtaining a certificate of public convenience and necessity. We believe, therefore, that the provisions of Act 69 of 1929 can only apply to intrastate commerce."

On bill in equity brought in the Circuit Court of Ingham County to review the Commission's order appellant alleged that

> "14. The unreasonable and unlawful order of the Michigan Public Service Commission is in direct and open violation of the laws of the United States and the statutes and practices of the State of Michigan, the Constitution of the United States, and the rights of the plaintiff; *it is in violation of the Commerce Clause of the Federal Constitution* (Article I, Section 8 (3))
>
> * * *
>
> "(a) No franchise, permit or certificate of authority from the State of Michigan authorizing the sale and delivery of natural gas to any industrial consumer in interstate commerce has been or can lawfully be required by it from the State of Michigan or any agency thereof. Such sales and deliveries at all times have

been and will continue to be component parts of interstate commerce, and neither the State of Michigan nor the Michigan Public Service Commission has any right, power or authority to require plaintiff to obtain or to attempt to obtain any such franchise, certificate or permit in order to sell and deliver such gas. Any attempt on the part of defendant to require such franchise, certificate or permit or to interfere with the business of plaintiff because of the lack of such franchise, certificate or permit is unauthorized by the laws of the State of Michigan, and *if any statute of such State is construed to purport to authorize the same, such statute as so construed to apply to the business of plaintiff is invalid as contrary to Article I, Section 8(3) of the Constitution of the United States.*" (Emphasis supplied.)

The Circuit Court held that the sales were sales in interstate commerce; that sales of natural gas by an interstate pipe line company when made direct to industrial consumers are subject to state regulation; but that the commerce clause limits and "the right of the State to regulate interstate commerce does not include the power to prohibit", as attempted by the order under review. The decree set aside the Commission order and enjoined the Commission from interfering with sales of gas by Panhandle to industrial consumers in the State of Michigan.

The Michigan Public Service Commission and Michigan Consolidated Gas Company appealed from the decree of the Circuit Court vacating the Commission's order on the ground among others that

"25. The Court erred as a matter of law in holding that, even in the absence of any act by the United States Congress, direct sales to ultimate industrial consumers of natural gas, which had moved in Interstate commerce, are beyond State regulation, solely because of the prohibitive force of the Commerce Clause of the Federal constitution."

The Supreme Court of Michigan, three judges dissenting, vacated the decree of the Circuit Court and reinstated the order of the Michigan Public Service Commission. It held that the decision of the Supreme Court of the United States in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U. S. 507, "controls decision here." It quoted from and adopted the decision at length, including the following passage,

> "The controlling issues therefore are two: (1) Has Congress, by enacting the natural act, 52 Stat. 821, 15 USC Sec. 717, in effect forbidden the States to regulate such sales as those appellant makes directly to industrial consumers; (2) if not, are those sales of such a nature, as related to the *Cooley* formula, that the commerce clause of its own force forbids the States to act."

The dissenting judges agreed that the *Indiana* case "is conclusive of at least one of the issues before us, vis., that the sales of natural gas here involved are in interstate commerce." They held that the *Indiana* case was not controlling, however, on the issue of the State's power to require Panhandle to obtain a certificate of public convenience and necessity prior to making sales in interstate commerce. The dissenting judges said:

> "So understood, this becomes, then, a plain case of the commission asserting the power to prohibit these sales in interstate commerce if they compete with the sales and business of local utilities. It is no mere coincidence the defendant's cease and desist order, by its own terms, expressly limits its restraint upon plaintiff to operations in municipalities already being served by some other public utility. The extent to which prevention of competition with a local utility was the motivating consideration may be gathered from the pleadings and from exhibits in the case, particularly telegrams from defendant and intervenor to the Federal

power commission protesting plaintiff's invasion of intervenor's 'distribution area'. Prevention of competition with local commerce by interstate commerce is an objective, in and of itself, not permitted under the 'commerce clause' to be accomplished by a state. *Hood & Sons* v. *DuMond*, 336 U. S. 525; *Buck* v. *Kuykendall, supra; Bush & Sons* v. *Maloy, supra; Baldwin* v. *Seelig*, 294 U. S. 511." (Emphasis ours.)

The following cases sustain the jurisdiction of the United States Supreme Court to review the judgment on direct appeal:

Lake Erie & Western R. R. Co. v. *State Public Utilities Commission*, 249 U. S. 422;

Merchants National Bank v. *Richmond*, 256 U. S. 635;

Dahnke-Walker v. *Bondurant*, 257 U. S. 282;

Bush Company v. *Maloy*, 267 U. S. 317;

Southern Pacific v. *Arizona*, 325 U. S. 761;

Panhandle Eastern Pipe Line Company v. *Public Service Commission of Indiana*, 332 U. S. 507.

Question Presented

Do a Michigan statute and an order duly entered thereunder which, as construed by the highest court of the State, prohibit the sale of natural gas in transit in interstate commerce by an interstate natural gas pipe line company directly to an industrial consumer in a municipality already served, without first obtaining a certificate of public convenience and necessity, contravene the commerce clause of the Constitution of the United States?

Statutes Involved

The validity of the following Michigan statutes was drawn in question and sustained:

(1) Act 69, Section 2 of the Public Acts of 1929 of Michigan (22.142 Mich. Stat. Ann.; C. L. 1948 Sec. 460.502), which reads as follows:

> "No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension."

(2) The order of the Michigan Public Service Commission issued under Act 69, Section 2, which is attached hereto as Appendix C. Under decisions of this Court such an order is a state statute within the meaning of the Constitution of the United States and 28 U. S. C. 1257 (2).

For the convenience of the Court, we also set forth Act 69, Section 5 of the Public Acts of 1929 of Michigan (22.145 Mich. Stat. Ann.; C. L. 1948, Sec. 460.505), which is referred to in the opinion of the Michigan Supreme Court. It reads as follows:

> "In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility, the benefit, if any, to the public in the matter of rates and

such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory. Every certificate of public convenience and necessity issued by the commission, under the authority hereby granted, shall describe in detail the territory in which said applicant shall operate and it shall not operate in or serve any other territory under the authority of said certificate."

Statement of Facts

Panhandle Eastern Pipe Line Company owns and operates an interstate natural gas transmission pipe line, transporting natural gas from gas wells in Texas, Oklahoma and Kansas into Michigan. It sells the greater part of its natural gas to local utilities for distribution and resale to consumers. A small part, however, of the natural gas so transported is sold by it direct to industrial consumers, such sales being commonly called "direct industrial sales." It is a "natural gas company" within the meaning of the Federal Natural Gas Act and is subject to regulation by the Federal Power Commission.

In October 1945, Panhandle Eastern made a contract to sell 25,000 m.c.f. of natural gas a day to the Ford Motor Company at its Dearborn plant, Michigan, for its own consumption. The Ford plant to be served was within a municipality already served by Michigan Consolidated Gas Company, a public utility engaged in distributing gas to the public.

The Public Service Commission, on complaint of Michigan Consolidated and after hearing, issued an order (February 18, 1946) that Panhandle Eastern:

"* * * cease and desist from making direct sales and deliveries of natural gas to industries within the State of Michigan, located within municipalities already being served by a public utility, until such time as it

> shall have first obtained a certificate of public convenience and necessity from this Commission to perform such services."

The Commission acted under section 2 of Act 69 of the Public Acts of 1929. It stated that by reason of the commerce clause the statute could not apply to *interstate* commerce but it found that direct sales by Panhandle to industrial customers were sales in *intrastate* commerce.

Panhandle brought an action in the Circuit Court of Ingham County to review the Michigan Public Service Commission's order, alleging that the order and the statute authorizing it were in violation of the commerce clause of the United States Constitution. The Circuit Court held that the proposed sale to Ford was a sale in intersate commerce, that it was subject to state regulation, but that the right of the State to regulate such interstate commerce does not include the power to prohibit, as attempted by the order under review. The crux of the opinion was in this passage:

> "* * * Regulation, as we understand the term as herein involved, means the power to prescribe the rules and conditions upon which the interstate commerce shall be conducted. In the instant case the order of the Commission restrains and prohibits the proposed furnishing of gas by Panhandle to Ford. This is the forbiddance, not the regulation of interstate commerce."

The decree of the Circuit Court vacated and set aside the Commission's order.

On appeal by the Public Service Commission and Michigan Consolidated, the Supreme Court of Michigan reversed the Circuit Court and upheld the validity of the Commission's order and the statute authorizing it against Panhandle's claim that they contravene the commerce clause.

The Court held that its decision was controlled by the decision of the Supreme Court of the United States in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U. S. 507. The three dissenting judges maintained that the *Indiana* case was controlling only on the point that the sales to industrial customers are sales in interstate commerce. They declared that the commerce clause rendered unconstitutional the statute requiring Panhandle to obtain a certificate of public convenience and necessity.

The Question Presented by This Appeal Is Substantial

This case brings to the Supreme Court the important question whether a Michigan statute and an order under it which prohibit selling gas in interstate commerce to a consumer located in a community already served, without obtaining a certificate of public convenience and necessity, contravene the commerce clause of the Constitution. The statutory purpose is to prevent competition deemed undesirable. The certificate may be granted or denied, in the sole discretion of the Public Service Commission.

The highest court in the State of Michigan decided in favor of the validity of the statute and order. It upheld the authority of the State to prohibit sales in interstate commerce for the purpose of preventing competition.

The Michigan Supreme Court decision is plainly based on a misconstruction of the holding of this Court in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507. Moreover, it is in open conflict with the applicable decisions of this Court.

(1) *Panhandle Eastern Pipe Line Company* v. *Indiana Public Service Commission, supra*, does not hold that the States have power to prohibit or obstruct sales of natural gas in interstate commerce when made direct to industrial

consumers. More particularly, it does not hold that a state is free, under the commerce clause, to prohibit a sale in interstate commerce in the absence of a certificate of public convenience and necessity which it, in its sole discretion, may grant or deny. There is nothing in the opinion of Mr. Justice Rutledge that points in that direction.

On the contrary, Mr. Justice Rutledge took pains to say (332 U. S. at pages 522-523):

> "State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests."

As to the power existing in the States over sales to industrial customers in interstate commerce, we submit that this Court in the *Indiana* case held only that the States were competent, both before and after enactment of the Natural Gas Act, to regulate rates and service incident to such sales to direct industrial users.

In the *Indiana* case the order was purely a regulatory order. In that case the order was to file tariffs, rules and regulations, annual reports, etc.—the initial stage in regulation of rates and service. In our case the Commission's order had no bearing on regulation of rates and service. It was nothing more nor less than prohibition of sales of natural gas in interstate commerce, unless the Commission in its discretion should first issue a certificate.

The holding of the Michigan Supreme Court that the "* * * Panhandle-Indiana decision controls here * * *" is plainly without foundation.

The dissenting judges in the Michigan Supreme Court

clearly understood the holding in the *Indiana* case and its scope. They said:

> "* * * decision therein is confined to the following: first, that the sales are in interstate commerce; second, that, as such, they are subject to state regulation as to *rates and service*, both under previous decisions of the court and by virtue of the provisions of the Federal natural gas act; third, that the orders of the Indiana commission requiring plaintiff to file tariffs, rules and regulations, annual reports, etc., are valid and permissible initial steps in the state's application of its regulatory plan to plaintiff. Nowhere in the opinion is it suggested that the Indiana commission sought to require, or that the court was upholding the right of the commission to require, plaintiff to obtain a certificate of public convenience and necessity before making, in Indiana, the sales in interstate commerce there involved. * * *."

(2) The power which the States are permitted to exercise by the commerce clause to regulate interstate commerce does not comprehend the power to obstruct or prohibit. The Circuit Court so held in this case and its decision was in line with controlling authorities.

West v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911);
Barrett v. *New York*, 232 U. S. 14 (1914);
Sault Ste. Marie v. *International Transit Co.*, 234 U. S. 333 (1914);
Buck v. *Kuykendall*, 267 U. S. 307 (1925);
Bush and Sons Co. v. *Maloy*, 267 U. S. 317 (1925);
Mayor of Vidalia v. *McNeeley*, 274 U. S. 676 (1926);
Allen v. *Galveston Truck Line Corp.*, 289 U. S. 708 (1932);
Hood & Sons v. *DuMond*, 336 U. S. 525 (1949).

In the above cases, the United States Supreme Court held that a state authority could not require a certificate of pub-

lic convenience and necessity because such action would be in violation of the commerce clause of the United States Constitution.

In *Sault Ste. Marie* v. *International Transit Co., supra,* an ordinance of the City of Sault Ste. Marie prohibited operation of ferry boats from that city across the St. Mary's River to Canada, "without first obtaining a license therefor". The ordinance was authorized by the city's charter granted by the State legislature. When the city sought to enforce the license provision of the ordinance against a ferry boat company, the company brought suit to restrain enforcement of the ordinance on the ground that the ordinance was a violation of the commerce clause of the Constitution.

The issue in that case was identical with the issue in the instant case. As Mr. Justice Hughes said:

> "It will be observed that the question is not simply as to the power of the state to prevent extortion and to fix reasonable ferry rates from the Michigan shore; it is not as to the validity of a mere police regulation governing the manner of conducting the business in order to secure safety and the public convenience. (See Port Richmond & B. Pt. Ferry Co. *v.* Hudson County, decided this day [234 U. S. 317, ante, 1330, 34 Sup. Ct. Rep. 821].) The ordinance goes beyond this. The ordinance requires a municipal license; and *the fundamental question is whether, in the circumstances shown, the state, or the city, acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the state, or the city, may make its consent necessary, it may withhold it.* * * *
>
> *"This question must be answered in the negative."*
> (Emphasis ours.)

In its decision this Court pointed out the difference between the power of the states to regulate interstate commerce as to rates (to prevent extortion and to secure rea-

sonable rates) and as to service (to promote safety and good order) and the lack of power of the states to prohibit or obstruct interstate commerce by making their consent (a consent which can be withheld at discretion) a condition precedent to doing interstate business. In this connection, Mr. Justice Hughes said:

> "Assuming that, by reason of the local considerations pertinent to the operation of ferries, there exists, in the absence of Federal action, a local protective power to prevent extortion in the rates charged for ferriage from the shore of the state, and to prescribe reasonable regulations necessary to secure good order and convenience, we think that the action of the city in the present case in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the state could exercise either directly or by delegation."

Buck v. *Kuykendall, supra,* a leading case, is squarely in point. An act of the State of Washington prohibited common carriers from using the highways by auto vehicles over regular routes without having first obtained a certificate of public convenience and necessity. The State courts construed the act as applying to common carriers engaged exclusively in interstate commerce. The United States Supreme Court held that the act so construed and applied was in violation of the commerce clause of the Federal Constitution.

Mr. Justice Brandeis said (pages 315-316):

> "*Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.* It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while

permitting it to others for the same purpose and in the same manner." (Emphasis ours.)

* * * * * * *

"Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause."

The parallel to the case at bar is manifest.

Only last year the principle set forth in *Buck* v. *Kuykendall* was reaffirmed by the United States Supreme Court in *Hood & Sons* v. *DuMond, supra.* Mr. Justice Jackson, speaking for the Court, said:

"This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.

* * * * * * *

"In *Buck* v. *Kuykendall*, 267 U. S. 307, the Court struck down a state act because, in the language of Mr. Justice Brandeis, 'Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.' The same argument here advanced, that limitation of competition would itself contribute to safety and conservation, and therefore indirectly serve an end permissible to the State, was there declared 'not sound'. 267 U. S. 307, 315. It is no better here."

In the instant case the statute and order in question denied Panhandle the right to make a sale in interstate commerce to an industry located in a municipality already

served until it first obtains a certificate of public convenience and necessity. As the dissenting judges pointed out, "the plain intent of the act" and "the clear legal import of the Commission order" is that

> "* * * plaintiff shall not make the sales in question unless and until the commission shall have determined that public convenience and necessity requires such sales and, axiomatically, that plaintiff shall never make such sales so long as the commission remains unpersuaded, in view of existing facilities, that public convenience and necessity do require such sales by plaintiff. * * *"

The statute manifestly falls within the rule that the power to refuse a certificate, and therefore to exclude from interstate business, constitutes an obstruction of interstate commerce—in violation of the commerce clause.

Further, the plain purpose of the statute is to limit competition. What other interpretation can be placed on a statute which requires a certificate *only* when a utility proposes to render service in a municipality *already* served? The Supreme Court of Michigan recognized that this was the purpose of the statute. It said:

> "The right to exclude such competition, where the general public convenience and necessity so require, has been delegated by the legislature to the Michigan Public Service Commission."

The dissenting judges found that this was "a plain case of the Commission asserting the power to prohibit these sales in interstate commerce if they compete with the sales and business of local utilities." They pointed out:

> "* * * It is no mere coincidence that defendant's cease and desist order, by its own terms, expressly limits its restraint upon plaintiff to operations in municipalities already being served by some other public

> utility. The extent to which prevention of competition with a local utility was the motivating consideration may be gathered from the pleadings and from exhibits in the case, particularly telegrams from defendant and intervenor to the Federal power commission protesting plaintiff's invasion of intervenor's 'distribution area.' Prevention of competition with local commerce by interstate commerce is an objective, in and of itself, not permitted under the 'commerce clause' to be accomplished by a state. *Hood & Sons* v. *DuMond*, 336 US 525; *Buck* v. *Kuykendall, supra; Bush & Sons* v. *Maloy, supra; Baldwin* v. *Seelig*, 294 US 511. * * *"

Thus, this case is also controlled by the principle that the State may not use its admitted powers to promote safety and to prevent extortion and fraud as an instrument for suppressing competition.

The Public Service Commission, as well as the Circuit Court, understood plainly enough the limitations which the Commerce Clause placed on the State's power over interstate commerce. The Commission said in its opinion:

> "We believe that the State of Michigan under the commerce clause of the federal constitution, is deprived of the power to impose as a condition upon the right to act in interstate commerce the requirement of obtaining a certificate of public convenience and necessity. We believe, therefore, that the provisions of Act 69 of 1929 can only apply to intrastate commerce."

The Commission's error was in concluding that the proposed sales by Panhandle to Ford Motor Company were in interstate commerce—an error exposed in the opinion of the United States Supreme Court in *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Commission, supra* (332 U. S. at pages 512-513).

It is submitted that the decision of the Supreme Court of Michigan erroneously failed to hold that the Michigan

statute and the order of the Michigan Public Service Commission issued thereunder which prohibit the sale of natural gas in interstate commerce to a direct industrial consumer without first obtaining a certificate of public convenience and necessity were unconstitutional under the commerce clause.

Respectfully submitted,

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APPENDIX "A"

STATE OF MICHIGAN, SUPREME COURT

PANHANDLE EASTERN PIPE LINE COMPANY, *Plaintiff and Appellee,*

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *Defendant and Appellant,*

MICHIGAN CONSOLIDATED GAS COMPANY, *Intervenor and Appellant.*

BEFORE THE ENTIRE BENCH

BOYLES, *C. J.*

The issue in this case is whether the direct sale of natural gas to local consumers in Michigan by the plaintiff, an interstate pipe-line company, is within the jurisdiction of the Michigan public service commission.

The Panhandle Eastern Pipe Line Company (hereinafter called Panhandle), a Delaware corporation, is engaged in the interstate transportation of natural gas by pipe line from Texas and other States into Michigan. It is an interstate natural gas pipe-line company, subject to regulation by the Federal power commission under the Federal natural gas act (15 U. S. C. Sec. 717, *et seq.*). It sells the greater part of its natural gas to local public utilities for resale for ultimate consumption. A part of its natural gas is sold by it direct to local industrial consumers, known as "direct industrial sales." In 1945 it entered into a contract with the Ford Motor Company to sell natural gas direct to said company at its Dearborn plant for its own consumption. The plant of said company is within a municipality already served by the Michigan Consolidated Gas Company, a public utility engaged in selling natural gas to consumers in said municipality after having been granted a certificate of public convenience and necessity to do so. Panhandle also sought other local customers, and publicly

announced an intention to sell directly to other industrial consumers when possible.

The said Michigan Consolidated Gas Company filed a complaint with the Michigan public service commission and, after notice and a hearing, the commission ordered that Panhandle

"cease and desist from making direct sales and deliveries of natural gas to industries within the State of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this commission to perform such services."

Section 2 of PA 1929, No. 69 (CL 1948, Sec. 460.502 (Stat. Ann. Sec. 22.142)), under which the Michigan public service commission assumed jurisdiction to make said order, provides:

"No public utility shall hereafter * * * render any service for the purpose of transacting or carrying on a local business * * * in any municipality in this State where any other utility or agency is then engaged in such local business and rendering the same sort of service, * * * until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such * * * operation, * * *."

Panhandle, claiming that said order of the Michigan public service commission prohibited it from selling natural gas in this State direct to a local consumer for its own use, filed in the circuit court of Ingham County the bill of complaint in the instant case to set aside and enjoin enforcement of the commission's order. It added to its bill of complaint the motion made by it before the Michigan public service commission, in which it sought the dismissal of the petition filed there by the Michigan Consolidated Gas Company, and making the claim:

"That the Michigan public service commission has no jurisdiction over the subject matter of the sale of natural gas, a commodity in interstate commerce, by Panhandle

Eastern Pipe Line Company to Ford Motor Company," and that:

"Panhandle Eastern Pipe Line Company has the right to sell and deliver gas to industrial consumers without regulation by the Michigan public service commission of such interstate commerce."

In the circuit court the Michigan Consolidated Gas Company intervened in the case and, after an extended hearing, the circuit judge entered a decree permanently restraining the Michigan public service commission from interfering in the direct sale of natural gas by Panhandle to the said Ford Motor Company or other industrial users in the State of Michigan. From said decree, the Michigan public service commission and the intervenor Michigan Consolidated Gas Company appeal.

Panhandle construes the order of the Michigan public service commission as an absolute denial of the right of Panhandle to sell natural gas in this State direct to local consumers for their own consumption and use; in other words, that said order denies Panhandle a certificate of public convenience and necessity to sell natural gas direct to local consumers. We do not so construe the order. It is, however, a direct order by the Michigan public service commission, finding that it does have jurisdiction to determine whether a certificate of public convenience and necessity shall be granted to Panhandle to carry on said operation. It denies the right of Panhandle to sell natural gas to the Ford Motor Company or other local consumers for their own consumption, without first obtaining a certificate of public convenience and necessity from the commission. It leaves the door open for a hearing before the Michigan public service commission as to whether or not public convenience and necessity requires the granting of such a certificate to Panhandle, after a proper hearing on that question. The statute states what the commission shall take into consideration in determining the question of public convenience and necessity, and what the certificate shall provide. CL 1948, Sec. 460.505 (Stat. Ann. Sec. 22.145).

If the commission, after such a hearing, should deny such a certificate to Panhandle, the statute affords it a remedy for review in the courts; and, on the contrary, if at such hearing the commission should grant such a certificate to Panhandle, the intervenor herein or any other interested party would likewise have the same right of review. The statute so provides. CL 1948, Sec. 460.506 (Stat. Ann. Sec. 22.146).

In the instant case the bill of complaint was filed and the decree entered in the circuit court, and also the appeal therefrom taken to this Court, prior to the decision of the United States supreme court in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana* (December, 1947), 332 U. S. 507. The statute law of the State of Indiana requires that a certificate of public convenience and necessity be obtained from the Indiana public service commission as a prerequisite to engaging in the operation of a public utility. Burns Ind. Stat. Ann. Sec. 54.601. In that respect the Indiana law is substantially the same as the statute law of this State (CL 1948, Sec. 460.502 (Stat. Ann. Sec. 22.142), *supra*). The decision of the United States supreme court in the *Panhandle-Indiana* case, *supra*, is so conclusive of the issue now before us that we quote from and adopt it at length, as follows:

"Broadly the question is whether Indiana has power to regulate sales of natural gas made by an interstate pipeline carrier direct to industrial consumers in Indiana. More narrowly we are asked to decide whether the commerce clause, Const., art. 1, Sec. 8, by its own force forbids the appellee, public service commission, to require appellant to file tariffs, rules and regulations, annual reports, etc., as steps in a comprehensive plan of regulation preliminary to possible exercise of jurisdiction over rates and service in such sales.[1]

"Panhandle Eastern transports natural gas from Texas and Kansas fields into and across intervening States, in-

[1] The commission is authorized to take these steps by Indiana statutes creating the State's regulatory scheme for public utilities. Burns Ind. Stat. Ann. Sec. 54-101 *et seq.*

cluding Indiana, to Ohio and Michigan. In Indiana it furnishes gas to local public utility distributing companies and municipalities. These in turn supply the needs of over 112,000 residential, commercial and industrial consumers.

"Since 1942 appellant also has sold gas in large amounts direct to Anchor-Hocking Glass Corporation for industrial consumption.[2] Shortly before beginning this service appellant had informed a number of its customers, local distributing companies in Indiana, that it intended to render service directly to large industrial consumers wherever possible.[3] Pursuant to that policy, since these proceedings began direct service has been extended to another big industrial user.[4]

"In 1944 the commission initiated hearings relative to direct service by Panhandle Eastern to Indiana consumers. It concluded that 'the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this commission under the laws of this State,' notwithstanding any alleged contrary effect of the commerce clause upon appellant's direct sales to industrial users. Accordingly it issued its order of November 21, 1945, for the filing of tariffs, etc., as has been stated.

"Early in 1946 Panhandle Eastern brought this suit in a State court to set aside and enjoin enforcement of the order.

* * * * * * *

"The trial court vacated the orders and enjoined the commission from enforcing them. It accepted appellant's

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[2] Appellant's sales to Anchor-Hocking are far larger than sales made to several of the local distributing companies. Thus, in 1943 appellant sold 1,150,279 cubic feet to Anchor-Hocking and only 151,065 cubic feet to the local utility served from the same branch line. * * *

[3] This was in 1941. In 1943 the chairman of appellant's board stated that 'Panhandle was anxious to take over such business because it was unregulated transaction both as to the Federal power commission and the public service commission of Indiana and that he intended to establish higher industrial rates based on a competitive fuel basis.'

[4] Prior to the hearings before the commission appellant had entered into arrangements to provide direct industrial service to an E. P. DuPont de Nemours & Company plant near Fortville, Indiana. That service was commenced subsequent to the hearings.

view of the effect of the commerce clause on its operations. The Supreme Court of Indiana reversed that judgment and denied the relief appellant sought. 224 Ind. 662. It held first that the commission's orders amounted to an unequivocal assertion of power to regulate rates and service on appellant's direct industrial sales and thus presented squarely the question of the commission's jurisdiction over such sales as affected by the commerce clause. The court did not flatly hold that the sales are in interstate rather than intrastate commerce. But, taking them to be of the former kind, it held them nevertheless subject to the State's power of regulation under the doctrine of *Cooley* v. *Board of Wardens*, 12 How. 299. The Court further held that appellant, in making these sales, is a public utility within the meaning and application of the State's regulatory statutes. Burns Ind. Stat. Ann. Sec. 54-105 and Ind. Acts 1945, c. 53, p. 110. It is this decision we have to review pursuant to Sec. 237 of the judicial code, 28 U. S. C. 344(a).[6]

"The effect of the State statutes, whether permitting the filing of the tariffs, etc., as information unrelated to further regulation or requiring the filing as initial and integral steps in the regulatory scheme, and thus as presenting at the threshold of the scheme's application the question of the State's power to go further with it, is primarily a question of construction for the State courts to determine. In view of the commission's position, as construed by the State Supreme Court, we cannot say that the only thing presently involved is the State's power to require the filing of information without reference to its further use for controlling these sales. Cf. *Arkansas-Louisiana Gas Co.* v. *Department of Public Utilities*, 304 U. S. 61. Here the orders constituted 'an unequivocal assertion of power' to regulate rates and service. Indeed they involve something more than a mere threat to apply the regulatory plan in its later phases. They represent

[6] Several of the local utility companies, which had been intervenors in the proceedings before the commission, were permitted to intervene in the court test of the orders and are appellee her. The National Association of Railroad and Utilities Commissioners has filed a brief *amicus curiae* in support of the commission's position.

the actual application of that plan in its initial stage. In such a situation appellant was not required to await a further regulatory order before contesting the commission's jurisdiction. Cf. *Public Utilities Comm'n* v. *Gas Co.*, 317 U. S. 456.

* * * * * * *

"The controlling issues therefore are two: (1) Has Congress, by enacting the natural gas act, 52 Stat. 821, 15 U. S. C. Sec. 717, in effect forbidden the States to regulate such sales as those appellant makes directly to industrial consumers; (2) if not, are those sales of such a nature, as related to the *Cooley* formula, that the commerce clause of its own force forbids the States to act.

"We think there can be no doubt of the answer to be given to each of these questions, namely, that the States are competent to regulate the sales. * * *

"Three things and three only Congress drew within its own regulatory power, delegated by the act to its agent, the Federal power commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

"The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the act 'shall not apply *to any other* * * * *sale* * * *.' (Emphasis added.) Those words plainly mean that the act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded.

"The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the

decisions had arrived in distributing regulatory power before the act was passed.[12]

"Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The act, though extending Federal regulation, had no purpose or effect to cut down State power. On the contrary, perhaps its primary purpose was to aid in making State regulation effective, by adding the weight of Federal regulation to supplement and reinforce it in the gap created by the prior decisions.[13]

* * * * * * * *

"Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had

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[12] "* * * (T)he Supreme Court has from the beginning allowed the State both to tax and and to fix the price on the first sale or delivery of gas or electricity brought in from a sister State when and if this first sale is also necessarily the last sale because consummated by consumption.' Powell, Note, 58 Harv. L. Rev. 1072, 1082.

[13] In HR Rep. No. 709, 75th Cong., 1st Sess., the committee on interstate and foreign commerce said of the proposed bill which became the natural gas act: 'It confers jurisdiction upon the Federal power commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 US 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transaction have been considered to be not local in character and, even in the absence of congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 US 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 US 83) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the State may not act.'

See also HR Rep. No. 2651, 74th Cong., 2d Sess. 1-3; Sen. Rep. No. 1162, 75th Cong., 1st Sess.

held the States could not reach.[15] That area did not include direct consumer sales, whether for industrial or other uses."

The Federal natural gas act, which the Court in the *Panhandle-Indiana* case thus construed as permitting State regulation of the sale of natural gas by Panhandle direct to industrial users for their own consumption, reads as follows:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. (June 21, 1938, ch. 556, Sec. 1, 52 Stat. 821.)" U. S. C. (1946 Ed.), title 15, ch. 15B, Sec. 717(b).

Since this case was argued and submitted, we have requested counsel to file further briefs limited to the question now before us, and such briefs have been filed. The questions asked of counsel were:

"1. If plaintiff now concedes that the rates may be regulated, how can this be done except through the Michigan public service commission? How can the latter legally regulate without Panhandle submitting itself to its jurisdiction by securing a certificate?

"2. Has Panhandle the right to sell natural gas direct to consumers for their own use and not for resale without a certificate of public convenience and necessity from the Michigan public service commission—in other words, is the authority of Michigan public service commission over such sales limited to regulation of rates and services?"

The issue in this Court has been narrowed down since the decree was entered from which the defendant and the

[15] See notes 12 and 13, supra.

intervening defendant have appealed. The bill of complaint filed in the circuit court by Panhandle, likewise the decree entered there by that court, and the appeal to this Court, in 1946, preceded the decision of the United States supreme court in the *Panhandle-Indiana* case, *supra* (December, 1947). Originally, the bill of complaint filed by Panhandle asked that the Michigan public service commission be permanently restrained *from interfering* with the sale of natural gas by Panhandle to the Ford Motor Company or any other industrial consumers in this State. The decree as entered permanently restrains the Michigan public service commission

"from interfering in the sale of natural gas by the Panhandle Eastern Pipe Line Company, its successors or assigns, to the Ford Motor Company or any other industrial consumers in the State of Michigan."

In this Court, since the decision of the United States supreme court in *Panhandle-Indiana, supra,* Panhandle concedes that

"sales of natural gas transported in interstate commerce, when made directly to consumers, are subject to State regulation as to rates."

Therefore, Panhandle now limits the issue, in this Court, to the claim that it has the absolute right in this State to sell natural gas direct to consumers for their own consumption and not for resale, subject only to the State's "regulation" of rates and services. To further delimit the precise issue now before us, Panhandle now specifically claims the right to sell natural gas to the Ford Motor Company and other industrial consumers for their own use, not for resale, in a municipality where the defendant Michigan Consolidated Gas Company is engaged in such local business and rendering the same sort of service; and claims the right to do so without any express authority, certificate, or approval from the Michigan public service commission, except as to rates.

Since the *Panhandle-Indiana* decision, Panhandle now necessarily concedes that the Federal natural gas act has

not occupied the field of sales of natural gas direct to consumers for their own consumption, not for resale (for example, the proposed sale to Ford Motor Company). In construing the Federal natural gas act, the United States supreme court in that case said:

"The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the act 'shall not apply *to any other* * * * *sale* * * *.' (Emphasis added.) Those words plainly mean that the act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded.

"The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses."

Panhandle also concedes that the defendant Michigan public service commission is the only State agency with power to exercise regulatory authority over the sales of natural gas in this State by a public utility. It now claims, however, the right to make sales of natural gas under the circumstances here involved, without the approval of the Michigan public service commission by the issuing to Panhandle of a certificate of public convenience and necessity from that State agency. As we have pointed out, such sales, without such a certificate, would be in direct violation of PA 1929, No. 69, Sec. 2 (CL 1948, Sec. 460.502 (Stat. Ann. Sec. 22.142)), which expressly declares that no public utility shall render any service in any municipality in this State where any other utility is rendering the same sort of service, until such public utility shall first obtain from the Michigan public service commission a certificate of public convenience and necessity. Furthermore, the defendant commission, were it to enter an order approving rates and services of Panhandle in the absence of such cer-

tificate, would also be acting in contravention of the express inhibitions contained in said statute.

Obviously, Panhandle seeks to skim the cream off the local market for natural gas in the municipality where the intervening defendant now provides such services, by selling gas to Ford Motor Company and other industrial users, without regard to the public convenience and necessity for natural gas by other users in the Detroit area, particularly for domestic use. If Panhandle is free to compete at will for such local markets, and take the cream of the business, any other utility providing the same service in the same area might be forced to obtain higher rates for its services when it must obtain its natural gas from Panhandle, and thus would face a distinct disadvantage. The right to exclude such competition, where the general public convenience and necessities so require, has been delegated by the legislature to the Michigan public service commission. It is within the power of that commission, after a proper hearing and upon a proper showing of the facts and the necessities, to determine whether Panhandle, by selling natural gas direct to industrial users in Detroit, would thus serve the public convenience and the necessities of users of natural gas in that area where Panhandle now claims the absolute right to engage in such service.

The *Panhandle-Indiana* case controls decision here. The right to sell natural gas in this State by Panhandle direct to consumers for their own use and not for resale, in a municipality where another public utility is rendering the same sort of service, is within the jurisdiction of the Michigan public service commission. Any other conclusion would allow Panhandle to engage in such business without either Federal or State control over the right to engage in such services. As a prerequisite to engaging in the business over which the Federal power commission has authority to control, Panhandle must obtain a certificate from that commission. As a prerequisite to engaging in that part of such business in this State over which the Congress has expressly relinquished control, the State regulatory commission has a like power. It has long been the general policy

of the law that a public utility should be subjected to governmental control.

The decree enjoining the Michigan public service commission from interfering in the sale of natural gas by Panhandle to industrial consumers is vacated and a decree may be entered in this Court affirming the order of the Michigan public service commission, with costs to appellants.

WALTER H. NORTH,
HENRY M. BUTZEL,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE.

Concurred with BOYLES, *C. J.*

STATE OF MICHIGAN, SUPREME COURT

PANHANDLE EASTERN PIPE LINE COMPANY, *Plaintiff and Appellee,*

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *Defendant and Appellant,*

MICHIGAN CONSOLIDATED GAS COMPANY, *Intervenor and Appellant.*

BEFORE THE ENTIRE BENCH

DETHMERS, *J.*

I do not concur with Mr. Chief Justice Boyles in reversal. I do agree that *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U. S. 507, is conclusive of at least one of the issues before us, viz., that the sales of natural gas here involved are in interstate commerce. Although reasoning in *Federal Power Commission* v. *East Ohio Gas Co.,* 338 U. S. 464, may give rise to some uncertainity as to the Court's continued adherence to that view, nevertheless the Court did not therein expressly overrule, despite its specific mention, the *Panhandle-Indiana* case. Does the holding in *Panhandle-Indiana,* as indicated by Mr. Chief Justice Boyles, support

defendant's contention that it may require plaintiff to obtain from it a certificate of public convenience and necessity as a prerequisite to making, within this State, the sales in interstate commerce here involved and, accordingly, order plaintiff to cease and desist from making those sales until such certificate has been obtained? I think not. On the contrary, the opinion in that case, as quoted at length in Mr. Chief Justice Boyles' opinion in this case, makes it clear that decision therein is confined to the following: first, that the sales are in interstate commerce; second, that, as such, they are subject to state regulation as to *rates and service*, both under previous decisions of the Court and by virtue of the provisions of the Federal natural gas act; third, that the orders of the Indiana commission requiring plaintiff to file tariffs, rules and regulations, annual reports, etc., are valid and permissible initial steps in the State's application of its regulatory plan to plaintiff. Nowhere in the opinion is it suggested that the Indiana commission sought to require, or that the Court was upholding the right of the commission to require, plaintiff to obtain a certificate of public convenience and necessity before making, in Indiana, the sales in interstate commerce there involved. Rather, in holding the State of Indiana clothed with regulatory power as to *rates and service*, the Court, significantly, said:

"State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided."

Defendant points to no such express congressional provision either in the Federal natural gas act or elsewhere.

Defendant cites *Clark* v. *Poor*, 274 U. S. 554, in which the Court held constitutional a state regulation providing that before operating over state highways a common carrier by motor shall apply for and obtain a certificate or permit therefor from a state commission and pay an extra tax for maintenance of highways and administration of laws governing their use even though applied to carriers engaged exclusively in interstate commerce. That it is not authority for defendant's position here clearly appears from the

statement in the opinion therein that while the State act called the required certificate a certificate of public convenience and necessity, the State commission had recognized that under *Buck* v. *Kuykendall*, 267 U. S. 307, and *Bush & Sons* v. *Maloy*, 267 U. S. 317, it had no discretionary power to grant or withhold a certificate on the grounds of public convenience and necessity or lack thereof as relates to carriers engaged exclusively in interstate commerce and that the commission was, therefore, willing to grant the certificate upon application and compliance with other provisions of the law. No such situation confronts us here. As stated in Mr. Chief Justice Boyles' opinion, the commission's order in the case at bar "is, however, a direct order by the Michigan public service commission, finding that it does have jurisdiction to determine whether a certificate of public convenience and necessity shall be granted to Panhandle * * * It denies the right of Panhandle to sell natural gas to * * * local consumers for their own consumption, without first obtaining a certificate of public convenience and necessity from the commission. It leaves the door open for a hearing before the Michigan public service commission as to whether or not public convenience and necessity requires the granting of such a certificate to Panhandle * * * The statute states what the commission shall take into consideration in determining the question of public convenience and necessity * * * CL 1948, Sec. 460.505 (Stat. Ann. Sec. 22.145)." The cited statute requires the commission, in determining the question of public convenience and necessity to "take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory". It is the plain intent of the act, from which alone the commission derives its power to grant certificates of public convenience and necessity, that the commission shall not issue such certificate unless and until it shall have determined, upon the basis of the considerations mentioned in the statute, that public con-

venience and necessity requires the applying utility to serve the territory. It is, therefore, the clear legal import of the commission order here involved that plaintiff shall not make the sales in question unless and until the commission shall have determined that public convenience and necessity requires such sales and, axiomatically, that plaintiff shall never make such sales so long as the commission remains unpersuaded, in view of existing facilities, that public convenience and necessity do require such sales by plaintiff. So understood, this becomes, then, a plain case of the commission asserting the power to prohibit these sales in interstate commerce if they compete with the sales and business of local utilities. It is no more coincidence that defendant's cease and desist order, by its own terms, expressly limits its restraint upon plaintiff to operations in municipalities already being served by some other public utility. The extent to which prevention of competition with a local utility was the motivating consideration may be gathered from the pleadings and from exhibits in the case, particularly telegrams from defendant and intervenor to the Federal power commission protesting plaintiff's invasion of intervenor's "distribution area". Prevention of competition with local commerce by interstate commerce is an objective, in and of itself, not permitted under the "commerce clause" to be accomplished by a state. *Hood & Sons* v. *DuMond*, 336 U. S. 525; *Buck* v *Kuykendall, supra; Bush & Sons* v. *Maloy, supra; Baldwin* v. *Seelig*, 294 U. S. 511. While a state may regulate the transportation and sale of natural gas in interstate commerce within its boundaries, it may not prohibit it. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229. A state cannot make the right to transport or sell, within its territorial limits, goods in interstate commerce dependent upon satisfying a state authority that public convenience and necessity requires such operation and upon thus securing a certificate of public convenience and necessity from the State. Statutes so providing are, in that respect, unconstitutional. Determination of the adequacy of existing facilities as affecting the right to sell in interstate commerce is distinctly a Federal and not a State function. *Buck* v. *Kuykendall, supra; Bush*

& Sons v. *Maloy, supra.* We are not impressed by defendant's suggestion that the latter two cases are overruled by *Clark* v. *Poor, supra,* inasmuch as the Court there upheld state regulatory action only as it was predicated upon State recognition of the force and applicability thereto of the *Buck* and *Bush* cases.

Defendant stresses a difference between the case at bar and the *Buck* and *Bush* cases in that in the latter cases a certificate had been applied for and refused, while here plaintiff has made no such application. The difference is of no legal significance in this connection. In testing the validity of the commission order a consideration of what the commission might do with an application of plaintiff for a certificate is of no consequence. The question is not whether the commission would exercise its powers properly, but, rather, what are the commission's powers? Under the commission's order plaintiff is prohibited from selling natural gas in Michigan to local consumers in interstate commerce until plaintiff secures a certificate of public convenience and necessity from defendant. Under the applicable Michigan statute the power of defendant to issue such certificate is conditioned upon a determination that public convenience and necessity so require. Inherent in the claimed discretionary power to grant is the power to deny the certificate. *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333. Do the provisions of the "commerce clause" permit the State commission to prohibit plaintiff from making sales in interstate commerce merely because the sales are not required by public convenience and necessity? The answer of the *Buck* and *Bush* cases is "no". The subsequently enacted Federal natural gas act has conferred no such powers upon the States. It is this lack of power in a state to condition the right to engage in interstate commerce therein upon its view of the requirements of public convenience and necessity which distinguishes this case from such cases as *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, cited by defendant, in which the State undertook no more than to license and subject certain intrastate commerce to what the Court had theretofore held to be permissible regulatory provisions, the

Court saying, appropriately enough, that one may not be heard to complain in advance of his application for a license that there is danger of refusal. The inapplicability of that language to a case such as this, in which the State seeks to assert a power which it does not possess, is obvious.

The decree of the trial court reversed the commission order and permanently restrained defendant from interfering with the sales in question. From its opinion it appears that the trial court did not thereby intend to prevent lawful regulation of such sales by defendant, but merely to prevent the interference implicit in the commission's order reversed by the Court. So construed, the decree should be affirmed, without costs, a public question being involved.

NEIL E. REID,
LELAND W. CARR.

Concurred with DETHMERS, J.

APPENDIX "B"

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

In Chancery

No. 26680

PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware corporation, *Plaintiff*,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION, *Defendant*,
MICHIGAN CONSOLIDATED GAS COMPANY, *Intervener*.

Opinion of the Court

Plaintiff is a Delaware corporation, authorized to do business in Michigan, engaged in transporting natural gas from Texas, Oklahoma, and Kansas into this State. Among

its customers is the Michigan Consolidated Gas Company, a public utility, distributing artificial and natural gas to ultimate consumers in the Detroit area, one of those customers being Ford Motor Company. On April 20, 1945, Panhandle and Ford entered into a contract wherein Panhandle agreed to furnish, and Ford agreed to buy, large quantities of gas upon an interruptible basis. The transmission lines of Panhandle cross the property of Ford, and in order to make this gas available to Ford it is contemplated that Panhandle will tap its line, build an extension about eighteen feet in length, and at that point install measuring and regulating devices. There the pressure will be reduced and gas can be taken away by Ford in three lines at different pressures.

On December 18, 1945, Michigan Consolidated filed its complaint with the Michigan Public Service Commission, charging that Panhandle had adopted a policy of making direct sales to industrial users, specificially complained of the Panhandle-Ford contract, and asked that such sales be restrained. The Commission issued an order to show cause and ordered a hearing thereon January 17, 1946.

On January 7, 1946, Panhandle filed its bill of complaint in Ingham County against the Commission, seeking an order to restrain the Commission from interfering with its contractual relations with Ford and from holding the contemplated hearing. Upon motion, the bill was dismissed, and the matter is now on appeal in the Supreme Court (Calendar No. 43339).

The Commission proceeded with the hearing as scheduled. Panhandle again urged dismissal, claiming that the proposed activities constituted interstate commerce, over which the Commission had no control. This question was taken under advisement, with determination thereof held, until all the proofs were submitted. On February 18, 1946, the Commission made its opinion, upholding its jurisdiction, and ordered Panhandle to cease and desist from making direct sales and deliveries to industrial consumers, excepting those at South Lyons and Albion, under special arrangements.

Panhandle filed the within bill of complaint on March 15, 1946, to set aside the above order of the Commission, whereupon Michigan Consolidated intervened, and upon filing of answers, hearing was had on May 13, 1946. The matter was submitted upon a written stipulation of facts and testimony taken before the Commission. Extensive briefs, in excess of two hundred pages, have been presented.

Defendant asked dismissal, claiming that the Commission's order should be reviewed by certiorari, rather than in the nature of a statutory appeal. Defendant's motion to dismiss is denied, under the authority of *National Automobile Transporters Association* v. *Ingham Circuit Judge*, 279 Mich. 394, wherein it is said:

> "It follows that under present statutory provisions a party conceiving himself aggrieved by a holding of the Michigan Public Utilities Commission on questions of fact or questions of law, may have review by bill in equity in the Circuit Court of Ingham County".

Intervener states that the question before the Court is as follows:

> "Has a 'natural gas company' operating a high pressure natural gas pipe line from Texas and Kansas fields to various points within the State of Michigan, under certificate of public convenience and necessity granted by the Federal Power Commission, and selling its product under requirement contracts and under rates approved by the Federal Power Commission to various public utilities regulated by and operating within the State of Michigan under certificates of public convenience and necessity issued by the Michigan Public Service Commission, the legal right to enter into competition with such public utilities by engaging in the business of selling natural gas by direct sales to present customers of such public utilities and to others operating within their service area, openly soliciting direct sales both within and without the areas served by such public utilities, maintaining an office with the State of Michigan staffed for the pur-

pose of carrying on said business and the solicitation thereof, and openly soliciting franchises for the purpose of taking away the industrial and other business of the public utilities, without first qualifying as a public utility in the State of Michigan, obtaining a certificate of convenience and necessity to serve in areas already served by other public utilities, and filing such data, accounts, rates and regulations as are required by the laws of the State of Michigan, and the rules and regulations of the Michigan Public Service Commission?"

Broadly speaking, this may be the question involved, but we should not overlook the fact that the matter which brought the problem to the Commission was Michigan Consolidated's complaint of the Panhandle-Ford contract. It seems we need only to decide whether the furnishing of gas by Panhandle to Ford is interstate or intrastate in nature, or, to state it differently, is the interstate transportation, sale and delivery of natural gas to an industrial consumer, in wholesale quantities, under contract, subject to the jurisdiction of the Michigan Commission. When, and if, Panhandle enters into a large number of direct industrial contracts, such widespread distribution and its resulting impact may or may not have some bearing in then determining its character.

The Commission urges that because plaintiff has the power of eminent domain and on occasion has asserted such right in this State, and also because it has been authorized to do business in Michigan, it has thereby made itself subject to local control. The Courts have ruled otherwise. In *Ozark Pipe Line Co.* v. *Monier*, 266 U. S. 555, it is said:

"Nor is it material that the appellant applied for and received a Missouri license or that it had power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the state an authority, denied by the Federal constitution, to regulate interstate commerce".

To the same effect are *State* v. *Public Service Commission*, 85 S. W. (2d) 890, and *State* v. *Shell Pipe Line Corp.*, 135 S. W. (2d) 510.

The point is also made that because the Natural Gas Act denies jurisdiction to the Federal Power Commission of direct industrial sales it must necessarily follow that the States possess such jurisdiction. While it is true the Courts have stated that the basic purpose of this legislation (Natural Gas Act) was to occupy the field in which the *Barrett* and *Attleboro* cases said the State might not act and that Congress meant to create a comprehensive scheme of harmonious regulation between State and Federal authority, the failure of Congress to confer such power upon the Federal Power Commission does not *ipso facto* give the States such power. The Commerce clause protects, regardless of the inaction of Congress and regardless of the desirability for local regulation. The Court said in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229:

> "The inaction of Congress is a declaration of freedom from State interference with the transportation of articles of legitimate interstate commerce * * *".

But regardless of the negation of the Federal statute over industrial sales, the Federal Power Commission has asserted jurisdiction of the instant controversy upon the ground that it is necessary for the Commission "to protect the adequacy of service to its (Panhandle's) customers". Commissioner's Brief, page 16.

One brief asserts that direct sales of gas are subject to State regulation, even though assumed to constitute interstate commerce. With this general statement we agree, with some qualification. But the right of the State to regulate interstate commerce does not include the power to prohibit. The same brief quotes from the case of *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, as follows:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with

them nationally is slight, such regulation has been generally held to be within state authority".

If local regulation may "not seriously interfere" with the operation of interstate commerce, then it may not, under the guise of regulation, prohibit such commerce. Regulation, as we understand the term as herein involved, means the power to prescribe the rules and conditions upon which the interstate commerce shall be conducted. In the instant case the order of the Commission restrains and prohibits the proposed furnishing of gas by Panhandle to Ford. This is the forbiddance, not the regulation of interstate commerce.

The cases decided by the United States Supreme Court and argued extensively in the briefs, beginning with *Public Utilities Commissioner* v. *Landon*, 249 U. S. 236, through *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635, have been considered. None decide the specific question here involved. Both sides take comfort in them, and argue that the various determinations lead to the support of their positions. The cases more nearly in point are from other Courts:

In *Sioux City* v. *Missouri Valley Pipe Line Co.*, 46 Fed. (2d) 819, the city sought to enjoin the Pipe Line Company from transporting natural gas from Nebraska into Iowa in order to supply directly packing plants in that city. The Court held that the transaction constituted interstate commerce and that the consent of the city could not be required. The Court said:

> "In this situation the question is: may they purchase natural gas in interstate commerce and have it brought in for their own consumption under particular and private contracts with a concern engaged in such interstate commerce but not engaged in any local public business."

The Court answered the question in the affirmative.

In *Interstate Natural Gas Co.* v. *Louisiana Public Service Commission*, 34 Fed. Supp. 980, plaintiff sold 99.83 percent of gas brought into the State in interstate commerce,

and the Court held that its entire business was not subject to the control of the Louisiana Commission.

In *State ex rel. Cities Service Company* v. *Mo. Public Service*, 85 S. W. (2d) 890, the Supreme Court of Missouri said:

> "In the case at bar, the only reasonable inference to be drawn from the evidence is that the gas is delivered from the foreign state directly to the industrial consumers in this state in compliance with a contract that was in existence between such consumer and the Pipe Line. We think it is immaterial whether the Pipe Line owns all or part of the lateral pipe line that the gas passes through from the main pipe line to the industry, as it was a continuous movement. It therefore follows that under rules announced in the East Ohio Gas Co. case, *supra*, and Missouri *ex rel.* Barrett *v.* Kansas Natural Gas Co. *supra*, that the Pipe Line was engaged in interstate commerce when it was delivering gas to the 12 industries and that the Commission does not have jurisdiction of the Pipe Line on account of these sales, unless it is given jurisdiction on account of other questions hereinafter discussed * * *.
>
> "We think that the Pipe Line was engaged in interstate commerce and that it was not subject to the jurisdiction of the Commission. From what we have said, it follows that the judgment of the Circuit Court should be reversed."

The United States Supreme Court denied certiorari, 296 U. S. 657.

I am impressed from all the cases that the correct distinction is whether the gas is transported into the local system for subsequent distribution to the public on demand or whether it is transported to a specific customer in wholesale quantities, under contract and without any holding out to supply the public generally.

In the first instance it is intrastate in character, subject to local control, but in the latter it is interstate and is not amenable to local regulation.

The intervener with much emphasis complains that if Ford is served directly by Panhandle it will lose a potential gross revenue of $1,600,000.00 a year, which in turn would ultimately be reflected in the rates of domestic users. Dire results are predicted. All this may be true, but that problem is not ours, but one for the National Congress, if it is to be controlled at all.

A decree may enter granting the relief prayed for in the bill of complaint. No costs.

PAUL G. EGER,
Circuit Judge.

Dated: October 5, 1946.

APPENDIX "C"

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing on the 18th day of February, A. D., 1946.

D-3335

PANHANDLE EASTERN PIPE LINE COMPANY:

In the matter of the complaint of the MICHIGAN CONSOLIDATED GAS COMPANY concerning the direct sales of natural gas by Panhandle Eastern to the Ford Motor Company.

Opinion and Order to Cease and Desist

On December 18, 1945, the Michigan Consolidated Gas Company complained to this Commission concerning the Panhandle Eastern Pipe Line Company.

The Panhandle Eastern Pipe Line Company is a corporation organized and existing under the laws of the State of Delaware. It was domesticated in the State of Michigan on July 21, 1942, and is at this time a foreign corpo-

ration admitted to do business within the State of Michigan. The company may hereinafter be referred to simply as "Panhandle".

Panhandle owns and operates an integrated natural gas pipe line system situated in the States of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio and Michigan. It is a "natural-gas company", as defined in the Natural Gas Act (15 U. S. C., Sec. 717, *et seq.*). It purchases and produces natural gas in the States of Texas and Kansas and it purchases natural gas in the State of Oklahoma. It is engaged in the transportation of natural gas through its transmission lines for sale (a) to local distributing companies for resale for ultimate public consumption for domestic, commercial, industrial, and other uses, and (b) directly to industries and to others for their own use.

Panhandle's main transmission line extends approximately 1,160 miles from the Amarillo Gas Field in the Texas Panhandle and the Hugoton Gas Field in southwestern Kansas. From the main transmission line, lateral or branch lines extend to interconnections with gas lines of various distributing companies and to industrial plants.

The Michigan Consolidated Gas Company is a corporation organized and existing under and by virtue of the laws of the State of Michigan. For convenience it may be hereinafter referred to as the "Gas Company".

The Gas Company is a public utility engaged in the business of supplying natural and artificial gas to the public for domestic, commercial and industrial use within the State of Michigan. One of the territories served by it contains the cities of Detroit, Hamtramck, Highland Park, Dearborn, River Rouge, Grosse Pointe, Melvindale, Wyandotte and Lincoln Park, and 22 contiguous or adjacent villages and townships in Wayne County. This territory is commonly known as and may hereinafter be referred to as the "Detroit District".

The regulations and schedules of rates of the Gas Company are on file with this Commission and the Company has obtained all requisite authority and approval under the laws of the State of Michigan to carry on its business within the State and particularly within the Detroit District.

The Gas Company obtains its entire supply of natural gas which it distributes within the Detroit District from Panhandle, taking delivery thereof at the terminus of Panhandle's natural gas transmission line in Melvindale, Michigan.

The Ford Motor Company purchases gas from the Michigan Consolidated for use in its River Rouge plant and elsewhere within the Detroit District. The furnishing of gas to the Ford Motor Company contributes materially to the income of the Michigan Consolidated. The gas received by the Ford Motor Company is used by it in its manufacturing business and of such gas it is the ultimate consumer.

The gist of the Gas Company's complaint against Panhandle is that Panhandle has entered into negotiations with the Ford Motor Company with the view to supplying directly a large amount of natural gas to that company for use and consumption at its River Rouge plant; and, that the proposed sale of gas to the Ford Motor Company is part of a definite plan and purpose by Panhandle to make sales of gas directly to industrial consumers in all territory within the State of Michigan which it is practical to reach by extension of its transmission lines, regardless of whether such customers are now served by, or within the territory being served by, the Michigan Consolidated or any other utilities distributing gas to local ultimate consumers.

This Commission is an administrative agency of the State of Michigan. It exists by virtue of the provisions of Act 3 of the Public Acts of 1939 and it is possessed of such powers as have been conferred upon it by statute.

The questions here to be determined are:

1. Does this Commission have jurisdiction over the subject matter of the complaint; and,
2. If it be determined that jurisdiction has been vested in the Commission, what conditions and requirements if any, shall be put upon Panhandle, in the event that the grounds of the complaint are established?

On the 21st day of December, 1945, this Commission issued its order to show cause, directed to Panhandle,

ordering it to show cause, if any there be, why this Commission should not enter an order against it to cease and desist from making direct sales of natural gas to the ultimate consumer within the State of Michigan, and more especially within the territory being presently served by a public utility distributing natural gas to the ultimate consumer, until such time as it shall have first obtained from this Commission a certificate of public convenience and necessity and shall have otherwise complied with the applicable statutes of the State of Michigan and with the relevant rules and regulations of this Commission concerning the distributing of natural gas to ultimate consumers.

The adjourned date under the order to show cause was the 17th day of January, 1946. At the time and place of the adjourned hearing Panhandle appeared specially and moved to dismiss the proceedings upon the grounds that the Commission lacked jurisdiction. A ruling upon the motion was deferred until such time as the Commission shall have heard the testimony of the parties, saving to Panhandle every benefit of its special appearance should it elect to participate further and offer testimony.

Having been assured upon the record by counsel for the Commission that all the rights and benefits of its special appearance were preserved and would in nowise be waived, Panhandle entered into a stipulation with the Gas Company as to certain facts and certain evidence, and both parties presented witnesses at the hearing, accordingly, a full hearing has been had upon the merits, and this Commission is now in position fully to dispose of the controversy.

By section 4 of Act 3 of the Public Acts of 1939 (22.13 (4), Mich. Stat. Ann., 1945 Supp.) all the rights, powers and duties vested by law in the Michigan public utilities commission and in the Michigan railroad commisson were transferred to and vested in this Commission.

By section 6 of Act 3 of the Public Acts of 1939 (22.13 (6), Mich. Stat. Ann., 1945 Supp.) it is provided:

"The Michigan public service commission is hereby vested with complete power and jurisdiction to

> regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including . . . oil, gas, and pipe-line companies . . .".

By section 4 of Act 3 of the Public Acts of 1939, it is also provided that:

> "Any order or decree of the Michigan public service commission shall be subject to review in the manner now provided by law for reviewing orders and decrees of the Michigan railroad commission or the Michigan public utilities commission".

By Section 26 of Act 300 of the Public Acts of 1909 (22.45 Mich. Stat. Ann.; C. L.'s '29, 11042) a plenary suit in the Circuit Court, In Chancery, for the county of Ingham is provided to review orders of the Michigan railroad commission; and under section 9 of Act 419 of the Public Acts of 1919, (22.9 Mich. Stat. Ann.; C. L.'s '29, 11014), the same review was provided for orders of the Michigan public utilities commission.

In its interpretation of the scope of the powers conferred by section 6 of Act 3 of the Public Acts of 1939, *supra*, this Commission has always considered the limits within which it may exercise its discretion to be fixed by the boundary of judicial reasonableness as determined by the Court under the statutory provisions for review. In brief, this Commission has always considered section 6 as a part of an entire act and not as an isolated section.

By section 2 of Act 69 of the Public Acts of 1929 (22.142 Mich. Stat. Ann.; C. L.'s '29, 11088) it is provided:

> "No public utility shall hereafter begin the construction or operation of any public utility plant or

system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension".

By section 1 of that act the terms used are defined: The term municipal is defined to mean a city, village or township. The term public utility is defined to mean "persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this State equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation". The term commission is defined to mean the Michigan public utilities commission.

We believe that the State of Michigan, under the commerce clause of the Federal Constitution, is deprived of the power to impose as a condition upon the right to act in interstate commerce the requirement of obtaining a certificate of public convenience and necessity. We believe, therefore, that the provisions of Act 69 of 1929 can only apply to intrastate commerce.

To invoke the prohibition found in Act 69 of the Public Acts of 1929, *supra*, it is necessary to find that Panhandle is engaging, or proposes to engage in, a local business and that it is a public utility.

This statement appears in the opinion of the Supreme Court of the United States in *Missouri, ex rel. Barrett* v. *Kansas Natural Gas Company*, 265 U. S. 298:

". . . The business of supplying, on demand, local consumers, is a local business, even though the gas

be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such connection the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

Again in *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465, the United States Supreme Court said:

". . . The treatment and division of the large compressed volume of gas is like the breaking of a large package, after shipment in interstate Commerce, in order that its contents may be treated, prepared for sale and sold at retail. (Cases cited.) It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State".

In the case of *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148, the gas company had four customers in Alabama. Three were intrastate utilities. The fourth was the Tennessee Coal, Iron & Railroad Company, a subsidiary of the U. S. Steel Corporation, which purchased gas for itself and affiliated companies operating steel and industrial plants in the Birmingham district and which were not public utilities but consumers. The question at issue was whether or not service to the fourth customer was service in intrastate commerce.

Mr. Chief Justice Hughes, writing for the Court, said:

". . . We had occasion in East Ohio Gas Company *v.* Tax Commission, 283 U. S. 465, 470, 75 L. ed. 1171, 1174, 51 S. Ct. 499, to consider the distinction between the transportation of gas into a state and the furnishing of the gas so transported to consumers within the State. . . .

". . . We perceive no essential distinction in law between the establishment of such a local activity to

meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the East Ohio Gas Co. case to constitute an intrastate business".

In the case of *Illinois Natural Gas Co.* v. *Central Illinois Public Service Commission*, 375 Ill. 634, 32 N. E. (2d) 157, the Illinois Supreme Court relied upon the mechanical tests as to whether or not there had been a reduction in pressure of the gas within the State of Illinois during transportation as being determinative of the question of the nature of the commerce. The appellant, an Illinois corporation, was a wholly owned subsidiary of the Panhandle Eastern Pipe Line Company. The appellant owned a pipe line system wholly in Illinois whose transmission pipe lines connected at various points in Illinois with the main line of Panhandle Eastern. Appellant, by long term contract, purchased its supply of gas from Panhandle Eastern and transported it through its own lines to local gas distributing utilities in Illinois to which it sold the gas for distribution to consumers in Illinois cities and towns. It also sold and delivered gas to several industrial consumers in the State. The gas moved continuously under pressure applied by Panhandle, from the gas fields until it entered appellant's transmission lines, where appellant reduced the pressure according to the needs of its services.

The Illinois Supreme Court held, that although the sale of the gas and its movement into the State was interstate commerce, that commerce came to an end when appellant reduced the gas pressure before its delivery into the service pipes of the distributors, accordingly, it held that the sale of the gas to the distributors was intrastate commerce.

On review this decision was reversed by the United States Supreme Court, 314 U. S. 498.

Such a result demonstrates that the answer to such a problem as confronts this Commission may not be discovered through the use of fiction and the reliance upon mechanical tests. We believe that the nature of the transaction, as intrastate commerce or otherwise, is not depend-

ent upon the employment of fictions and mechanical tests, but is determined by the essential character of the commerce.

In this connection, see the case of *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, where the United States Supreme Court held that the fact that the discharge of oil from ships into storage tanks in interstate transportation occurred at the same time that the oil was being drawn from the tanks into cars for distribution did not prevent the distribution from being intra- instead of interstate, the Court saying:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having independent or intrastate character, even though it be in the same cars. . . ."

In our opinion the essential fact here is that the Panhandle Eastern is undertaking direct service to ultimate consumers within the State of Michigan.

We hold that the rendering of service to the ultimate consumers by a natural gas company constitutes doing a local business and is intrastate in character. We also hold that the term "ultimate consumer" includes within its scope the industrial users of gas as well as the commercial and residential users.

Should we be in error as to the present state of the law and should it still be necessary to proceed upon the basis of fiction, the facts in this case permit of the use of mechanical tests. Panhandle's main transmission line in this State is a 22 inch line. Deliveries to industries within the State of Michigan, and in particular deliveries to the Ford Motor Company will not be made directly with this line. To make such deliveries it will be necessary that the main

transmission line be tapped and that metering facilities be employed. This situation is illustrated by the arrangements which are being made to render the direct service to the Ford Motor Company. Panhandle proposes to tap its 22 inch line with an extension line approximately 18 feet long. At that point they will install a 10 inch valve. The valve will be swedged to 12 and ¾ size, and the proposed pipe is 12 and ¾ inches O. D.

Panhandle proposes to erect a meter and regulator station and this is required for the purpose of regulating and measuring the volumes of gas sold to the Ford Motor Company.

The type of station to be erected is known as an "orfice meter measuring station" and will consist of three 10 inch runs with the necessary valves, fittings, orfice flanges, and recording instruments. There will be three regulators, one installed in each run. All of this will be housed in a suitable building and all will be located, according to present plans, in close proximity to the main transmission line. It will be connected with the main transmission line through a tap to be made in that line. At the outlet of the metering station there will be a connection to the proposed line which is to be built by the Ford Motor Company.

The meter measuring and regulator station is to be used for controlling the pressure and determining the quantities of gas that will be delivered at that point to the Ford Motor Company. All of the gas that is proposed to be delivered to the Ford Motor Company will go through the tap and into the meter station. On the inlet side of the station there may be 600 pounds working pressure; on the outlet side of the station the pressure will not be more than 100 pounds.

Under the arrangement if the Ford Motor Company so desired, gas could be taken away from the metering station at three different pressures and three different lines.

We believe that the erection and use of the facilities and connections above described satisfies any mechanical test as to reduction in pressure and the breaking of bulk, and that the direct delivery by Panhandle Eastern to the Ford

Motor Company of natural gas to be consumed by that company is not interstate commerce.

At this time we do not hold that it is necessary to obtain from us a certificate of public convenience and necessity for the erection of such facilities, and we reserve decision of this question until such time as an application is made to us for a certificate.

From its text it is clear that Act 69 of the Public Acts of 1929 applies only to public utilities. Is the Panhandle Eastern a public utility within the State of Michigan? We are of the opinion that when the Panhandle Eastern Pipe Line Company undertakes the service of natural gas to ultimate consumers within the State of Michigan it is acting as a public utility within the meaning of that term as used in the act; and, so we find.

In a broad sense the term "public utility" includes any business enterprise in which the public has such an interest as will sustain public regulation. Within such a meaning an insurance company is a public utility (*German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389); so is a distributor of milk (*Nebbia* v. *New York*, 291 U. S. 502). In the more customary sense the term refers to a business enterprise where there has been a holding out of service to the public and property has been devoted to a public use.

Panhandle contends that it has not devoted its property to a public use and points to the fact that all services rendered by it are contractual. The employment of a contract is not controlling of the question. Every customer of any utility is a contractual customer; because before service will be commenced the utility requires that a contract be signed. This is true of electrical companies, telephone companies, common carriers and all others engaged in the utility field. In the case of *Breuer* v. *Public Utilities Commission*, 118 Ohio St. 95, 160 N. E. 623, the Court pointed out that the fact that a contract is executed in each particular case by the transportation of merchandise, so long as the service is available to any responsible party requesting it does not prevent the enterprise from being a

public utility and subject to regulation as such. The Court said:

> "Breuer admitted that he would execute a contract with anyone who had merchandise to be transported, and that it was only a question of the patron agreeing to his terms, and the patron being a responsible person. Obviously it was necessary that the person be a responsible person, because he did not collect in advance; neither did he collect upon delivery of the merchandise. . . . The decisive feature of the case is, as admitted by him, that he would enter into a contract with any responsible person for a single transaction to the limit of the capacity of his equipment. This comes clearly within the definition laid down by all the authorities, many of which are cited in Hissen *v.* Guran, 112 Ohio St. 59, 146 N. E. 808. The Commission having found that he was a common carrier, and therefore subject to regulation, its order must be affirmed".

In the case of *Michigan Public Utilities Commission* v. *Kroll*, 245 Mich. 297, the Michigan Supreme Court had a similar problem before it. This is a carrier case and the carrier insisted that he was a contract carrier because he required contracts of his customers before rendering service. The Michigan Court said:

> ". . . To all intents and purposes there has been no change in the nature of the business done by him after the last permit was refused, except that he sought to protect himself from a violation of the law by securing the contracts entered into from his regular patrons and performing other services which might be called 'errands' for customers. The law will not permit such an evasion of the intent and purpose of the staute " . . .

The declared policy of the Panhandle is to take over and serve directly such industrial customers as it may obtain. Such policy has been declared by the Panhandle on numerous occasions. Under the stipulation of facts en-

tered into by the parties to these proceedings, the following testimony of Oscar Morton is presented. Mr. Morton is the rate engineer of Panhandle and he was testifying at a hearing before the Federal Power Commission held on February 26, 1945. The testimony is as follows:

> "Q. And I suppose that if the industrial market increases, if others than DuPont show an interest in obtaining gas, you would also want to serve that directly, any other industrials?
>
> A. Yes.
>
> Q. That is, you wouldn't want to, for instance, share the industrial market with the local distributing companies?
>
> A. Of course, you say 'if you'. You mean the company policy?
>
> Q. Yes.
>
> A. It is our policy to secure as much of the load as direct as possible.
>
> Q. Would you say that that policy related to the overall Panhandle system? That is, it is their policy to obtain any place on or adjacent to their system as much direct industrial gas as they can?
>
> A. Yes, sir, that is the avowed policy of the company."

Within its organization the Panhandle Eastern Pipe Line Company has a department known as the "New Business Department". It is the function of this department to obtain new direct industrial business for the Panhandle Eastern. There has been stationed at Detroit, in the State of Michigan, for several years an employee of the Panhandle whose work is directed by the head of the New Business Department. This gentleman's name is Ballard, and he has, in performance of his duty, been active in the solicitation of new, direct industrial business.

We are of the opinion that the fact that at the present time Panhandle has only two industrial customers within the State of Michigan, namely, the Michigan Seamless Tube Company, at South Lyons, Michigan, and the Albion Malleable Iron Company, at Albion, Michigan, is not controlling

the question as to the breadth of the company's activities. If a particular service rendered is offered to all those members of the public who can use that particular service, the public is in fact served, and the business is affected with the public interest, although the actual number of persons so served is limited. Furthermore, from the very nature of things the beginning of any public utilities operations is limited to a few original customers. Panhandle Eastern, under its policy, plans to add customers so soon as they are available.

The business of transporting and delivering natural gas is a business affected with the public interest; otherwise it would not be lawfully subject to regulation by the Federal government. The public nature of the business is not changed because of the fact that territorially it is confined within the limits of a single state.

We are of the opinion that it is unlawful for the Panhandle to make direct service of natural gas to industrial consumers in the State of Michigan within municipalities already being served by a public utility until it shall have first obtained a certificate of public convenience and necessity so to do, accordingly,

It is ordered That the Panhandle Eastern Pipe Line Company, a Delaware corporation admitted to do business within the State of Michigan, cease and desist from making direct sales and deliveries of natural gas to industries within the State of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this Commission to perform such services.

This order shall not apply to service to the Michigan Seamless Tube Company, at South Lyons, Michigan, for the reason that such service was approved by the order of this Commission entered on the 12th day of July, 1943; nor to service to the Albion Malleable Iron Company, for the reason that such service is being performed through the Albion Gas Light Company and under terms and conditions agreeable to that company, the Albion Gas Light

Company being a public utility directly authorized to perform such service.

Panhandle's motion to dismiss is hereby denied.

MICHIGAN PUBLIC SERVICE COMMISSION,
W. J. McBREARTY, *Chairman,*
S. L. MARSHALL, *Commissioner,*
J. H. SCHOUTEN, *Commissioner,*
G. T. SHILSON, *Commissioner* (SEAL)

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